UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LES SCHWIMLEY MOTORS, INC., Appellant,	)	No. 22450
vs.	)	
CHRYSLER CORPORATION, Appellee.	)	

APPELLANT'S OPENING BRIEF

Appeal from Order Dismissing Action by
The Federal District Court
for the
District of Nevada

Honorable Bruce R. Thompson, Judge

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JURISDICTION

The above action was filed in the Federal District Court of the Eastern District of California on the basis of a diversity of citizenship action wherein plaintiff, a California corporation, was suing defendant, a Delaware corporation, for an amount in excess of $10,000.00. (See Title 28 U.S.C.A. 1332, Complaint, Transcript of Record, page 3) The matter was thereafter transferred upon proper motion to the Federal District Court for the District of Nevada. (Memorandum and Order, Transcript of Record, page 84) The Nevada Court upon motion made by defendant dismissed the action. (See Order Dismissing Action, Transcript of Record, page 98 to 100) This appeal was taken from that order of dismissal by virtue of 28 U.S.C.A. 1291 and 28 U.S.C.A. 1294(1).

INTRODUCTION

Plaintiff, a California corporation, first filed its complaint in the above entitled action November 4, 1966 in the United States District Court for the Eastern District of California. The complaint encompasses six causes of action against Chrysler Corporation growing out of that corporation's discontinuance of the Desoto line of automobile in November of 1960.

At that time plaintiff was a Desoto Plymouth dealer in Reno, Nevada, operating under a dealers' agreement executed between plaintiff and defendant May 1, 1958. (Complaint, Transcript of Record, page 2 to 11)

On January 4, 1967, defendant filed a Motion to Dismiss plaintiff's complaint claiming that all causes of action were time barred by the California statute of limitations including plaintiff's first cause of action for breach of contract. (Notice of Motion and Motion, Transcript of Record, page 13 and 14) The discontinuance of Desoto by Chrysler Corporation occurred November 18, 1960, some five years, 351 days before the plaintiff's complaint was filed. (See Complaint, Transcript of Record, page 4 and 5)

On February 23, 1967, in answer to defendant's Motion for Dismissal, plaintiff filed a Motion for Change of Venue pursuant to provisions of 28 U.S.C.A. 1404(a) and 1406(a) to have the matter transferred to the U. S. District Court for the District of Nevada. (Notice of and Motion for Change of Venue, Transcript of Record, page 21 and 22) This motion was made based on the premise that Nevada was the most convenient forum to hear the matter. (Memorandum in Support of Motion for Change of Venue, Transcript of Record, page 28 to 36) At the time the Complaint was originally filed, the plaintiff corporation was not in good standing in California having failed to pay certain State taxes. A certificate of revivor was executed by the Franchise Tax Board of the State of California April 21, 1967. (Transcript of Record, page 72) Notwithstanding the problem of plaintiff's capacity to sue at the time the suit was filed, the California statute of limitations had barred all six of plaintiff's causes of action including his first cause of action for breach of a written contract.

On June 30, 1967, the Federal District Court for the Eastern District

of California transferred the case to the U. S. District Court for the District of Nevada. (Transcript of Record, page 79 and 84) In its opinion the California court found that Nevada was the more convenient forum and also expressed its belief that the law of the transferee forum should be applied including the Nevada six year statute of limitations for breach of a written contract. (See Memorandum and Order, Transcript of Record, page 83 line 4 to page 84 line 5) At this point, plaintiff had conceded that if it had any cause of action it was only under the first cause of action for breach of a written contract for all other theories in the complaint were barred by the statute of limitations whether California or Nevada law was applied.

On November 7, 1967, the Nevada District Court granted defendant's motion to dismiss the entire action. Defendant's Motion for Dismissal had been transferred to the Nevada Court unruled upon by the California Court when the California Court granted plaintiff's Motion for Change of Venue. The Nevada Court in dismissing the plaintiff's complaint found that in fact the Nevada statute of limitations did apply, but that the plaintiff corporation, since not in good standing under California law, had no capacity to sue at the time the complaint was filed November 4, 1966, nor at the time the Nevada statute of limitations for breach of a written contract ran November 18, 1966, and that under Rule 17b of the Federal Rule of Civil Procedure the capacity of a corporation to sue was governed by the state of its organization. (Transcript of Record, page 98 to 100, Order Dismissing Action, see page 2 lines 22 to 24)

It is from the Nevada Court's wooden application of Rule 17b which determines that plaintiff's capacity to sue is governed by the law of Cali-

fornia that plaintiff has taken this appeal.

ARGUMENT

I. THE APPROPRIATE LAW TO BE APPLIED TO ANY LITIGATION IS THE ENTIRE LAW OF THE FORUM HAVING THE MOST SIGNIFICANT CONTACTS WITH THAT LITIGATION

Under Nevada law (78.585 Nevada Revised Statutes) a corporation has capacity to file and prosecute a cause of action even though not in good standing at the time the complaint is filed. The Federal District Court of the District of Nevada has already ruled that the Nevada six year statute of limitation applies to plaintiff's first cause of action. (See Order Dismissing Action, Transcript of Record, page 99, lines 22 to 24) We are therefore here concerned with the application of Rule 17b of the Federal Rules of Civil Procedure which when applied to this cause eliminates plaintiff's capacity to sue since at the time the complaint was filed in California the plaintiff was not in good standing in California and was therefore under California law lacking capacity to file the lawsuit. It is plaintiff's position (1) Nevada has the most significant contacts with the issues of the litigation and the greatest interest in its outcome and (2) under Nevada law the plaintiff corporation had the capacity to file and proceed with the complaint. Therefore the Nevada Court should apply the local forum rule governing a corporation's capacity to sue and disregard the application of Rule 17b as producing a result conflicting with the Nevada policy governing capacity and not in keeping with the enlightened trend of the Conflict of Laws that the law of the forum with the most significant contacts with the litigation should be applied to govern that litigation.

The defendant, while arguing against plaintiff's Motion for Change of

Venue which was subsequently granted, reasoned that under the holding in Van Duson vs. Barrack, 376 U.S. 612, a change of forum pursuant to the federal statute can never result in a change of law. As the plaintiff in its Memorandum in Support of that Change of Venue (Transcript of Record, page 33 line 11 to page 34 line 5) and the District Court for the Eastern District of California in their Memorandum and Order granting that change of venue pointed out (Transcript of Record, page 82 lines 6 to 10), Van Duson specifically limited its decision by saying:

> "We do not and need not consider whether in all cases 1404(a) would require the application of the law of the transferor as opposed to the transferee's state. We do not attempt to determine whether for example the same considerations would govern if a plaintiff sought transfer under 1404(a)."

Why would the Federal Court in Sacramento transfer to preserve the plaintiff's cause of action against application of the California statute of limitations when it was cognizant that a strict application of Rule 17b would force the Nevada Court to apply California law regarding capacity of a corporation to sue and thereby dismiss plaintiff's complaint? The California Court transferred the case expressing its belief that the Nevada Court should apply the law of the transferee forum on the reasoning that Nevada had the greatest interest in the proceedings.

> "Particularly whereas here the plaintiff could have with equal right proceeded in either forum. It does not seem unreasonable to allow him to invoke the substantial state policies to which he was entitled." (Memorandum and Order Granting Change of Venue, page 4, Transcript of Record page 82 lines 11 through 14)

The California Eastern District Court was speaking of the substantial policies of the State of Nevada and went on to say in this connection:

> "The American law institute in its impressive study of the division of jurisdiction between state and federal courts has proposed in those cases where the plaintiff moves for

> a change of venue, the law of the new forum should be applied (see proposed final draft number 1 (1965) section 1306(c), page 21 and the commentary at page 99 et seq.). The institute is in full accord with the Van Duson rule but view it as being applicable only to protect the plaintiff in those cases where transfer would abrogate the legal right that was invoked in the Federal Court. While the wooden application of that rule to all venue transfer cases had a certain symmetry, it is nonetheless unsound. As the institute recognizes the interests to be protected are quite different when the plaintiff seeks to transfer a case to a forum in which he could have initially instituted his suit." (Transcript of Record, page 82 line 17 to page 83 line 3)

The Federal District Court of the Eastern District of California transferred the plaintiff's cause of action because it felt Nevada to be the most convenient forum to hear the case. It is certainly implicit in that decision that the court also felt that Nevada had the most significant contacts with the litigation.

The plaintiff is a California corporation in name only. All its business was conducted in Nevada and all its assets were located in Nevada. Its debtors and creditors were located in Nevada. California has no interest in having its rules of capacity apply for whether this lawsuit is pursued successfully or unsuccessfully, it in no way affects nor is it in any way connected with the operation or the policies of the State of California. The plaintiff corporation was a dormant entity which had operated and failed all in Nevada and although not in good standing in Nevada to carry on business due to certain procedural deficiencies at the time this suit was originally filed, it was capable under Nevada law of filing and pursuing a lawsuit. (See Affidavit in Support of Memorandum for Change of Venue, Transcript of Record page 23 to 27, Supplemental Memorandum in Support of Motion for Change of Venue, Transcript of Record, pages 69 and 70,

and 78.585 of the Nevada Revised Statutes) To apply the law of California concerning the capacity of the plaintiff to file a lawsuit is to totally disregard the relevant interest test determining what law to apply where there are competing forums involved. In December of 1967, in Travelers Insurance Company vs. Workmen's Comp. Appeals Board, the California Supreme Court speaking through Justice Tobriner stated its present position in this area of the law when it said:

> "California has rejected the traditional mechanical solutions of choice of law problems and adopted foreign law only when it is appropriate in light of the significant interest in the particular case. The significance of extra state elements varies directly with the nature of the forum's interest in a given case." (Travelers Insurance Company vs. Workmen's Comp. Appeals Board, 68 AC 1, page 1)

Nevada has expressed its legislative intent concerning the capacity of a corporation to sue when not in good standing. (See 78.585 Nevada Revised Statutes) Why should plaintiff corporation which is pursuing a cause of action found to be more appropriate in Nevada be precluded from pursuing an action proper in the local forum by laws of a foreign forum which both the courts of the local and foreign forum have concluded has a subordinate interest to the local forum in the cause of action?

In an extensive treatment of this subject in Volume 75 of the Yale Law Journal, which gives an analysis of all the major cases in the area, the author indicates that the article's purpose is to

> "propose treating the question of applicable law after transfer of venue as one best resolved by independent federal choice of law which would apply those laws of the state which best effectuates state policy interest in the particular case." (See page 92)

At page 107 the article goes on:

> "If Erie's (Erie R. Co. vs. Tompkins, 304 U.S. 64) purpose of

> allowing maximum expression of local policies is to be fully achieved, a flat rule choosing either the law of the transferee or that of the transferor in all cases must be rejected. Instead, Courts should use methods development by modern Conflict of Laws theorists to choose that state law whose application in a particular case best effectuates the policy goal served by the law."

The article in discussing capacity to sue puts forth the premise that in determining capacity an interest analysis should apply and might have been used to reach the same result as that of Van Duson, supra, where the court protected the plaintiff's right by applying the law of the transferor forum.

> "This approach calls for a consideration of the substantive contacts of the state laws in competition and the specific policy goals which the laws were designed to achieve . . . The court would measure state's interest in having its law applied by the extent to which the application of its law to the particular facts would effectuate the policy goals of the law and by the extent to which non-application of the law would frustrate its goals. The law selected would be the law of the state with the greatest interest in its application."

The Law Journal article cites Chenoweth vs. Achison, Topeka and Santa Fe Railroad, 229 Fed. Supp. 540, for the proposition that in fact the court in that case made an interest analysis to determine the issue of capacity. In the Chenoweth case, the matter was transferred from Colorado back to Kansas where the case was originally filed in order for the Kansas Court to determine which state law should determine capacity to sue. The Colorado Court in re-transferring the case listed a number of interest elements which the Kansas Court could consider in making its determination.

> "We think it proper that a Court familiar with the Kansas law should specify which state's law governs capacity to sue in a wrongful death action brought in Kansas."

Certainly the thrust of this decision is that capacity to sue should be

determined by the law of the forum which has the greatest contacts with the litigation and the greatest interest in the outcome of the litigation. In the case presently before the Appellate Court, the California court specifically states that the Nevada statute of limitations should apply and inferred that the Nevada rules as to capacity should be applied. If this were not the case, the California Court certainly would not have performed the idle act of transferring venue to the Nevada Court in the first place.

In Babcock vs. Jackson, 12 New York 2d 473, 191 Northeast 2d 279 (1968), the New York Court applied its own no guest statute bar to an accident occurring in Ontario involving New York citizens on the reasoning that the New York Court had the more relevant interest. Thomas F. Lambert, Jr., discussing the decision and in commenting on the so-called center of gravity theory in 30 NACCA Law Journal, page 35, says at page 39:

> "As Judge Foll pointed out in Babcock, a similarly inflexible choice of law rule in the field of contracts rooted like the torts rule in the Vested Rights Doctrine referred all matters bearing upon the execution interpretation and validity of a contract of the place where the contract was made . . . disillusioned by the arbitrariness of this traditional rule the New York Courts have led a successful revolt in the contracts field and have forced adoption of an infinitely more flexible rule, namely, the most significant relationship concept culminating in the accolade of approval of the American Law Institute in its contracts draft for the second conflicts restatement."

Lambert (page 47) goes on to comment upon and quote from the writing of Bernard Currie on the subject:

> "Even Professor Bernard Currie, who has made so much sense, brilliant, consecutive, and cumulative in the conflicts area of torts and who has been sinking critical switchblades into the 'center of gravity' and 'grouping of contacts' test as being unimplemented metaphorical phrases, is heartened by Babcock. While he would abandon 'center of gravity' and other 'pagan metaphorical phrases' still I cannot complain overmuch

> however when the Court while speaking the language of metaphor explicitly decided the case in the most reasonable and objective way that seems possible: By reference to the policies and interests of the respective states, by construction and interpretation of the respective laws, the center of gravity has come of age. Cheery comment on Babcock vs. Jackson, 63 Columbia Law Review 1233, 1234, 1243, 1963."

While the Babcock case applied specifically to the field of torts, it is apparent that the writers and the most enlightened rulings in the Conflict of Laws are using the center of gravity or significant contacts theory as a means of answering problems like the one presently before the Court. Professor Lambert in his final paragraph makes the following statement referring to Babcock:

> "This basic concept rejecting the artificial wooden and mechanical place of injury rule in interstate tort situations and replacing it with a balancing of interests of the states concerned explicitly seeking 'the center of gravity' of the occurrence makes Babcock one of the major endurable decisions in the modern conflicts of law of torts. In its approach Babcock is policy-oriented, not situs obsessed. Its interest analysis, its quest for the center of gravity of the occurrence is surely a key to unlock the future in the conflicts area of torts and its insight that purpose is more relevant than place gives it a sure warrant of enduring worth in the long tally of time."

Certainly Professor Lambert is not limiting this type of thinking in the conflict of laws to the area of torts. He is advocating the reasoning behind the Babcock decision for any area of the law where choice of law becomes a problem.

II. RULE 17b OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE DISREGARDED WHEN THE RESULTS OF ITS APPLICATION WOULD BE IN CONFLICT WITH THE POLICY CONSIDERATIONS OF THE LOCAL FORUM WHERE THE LOCAL FORUM HAS THE MOST SIGNIFICANT CONTACTS WITH THE LITIGATION BEFORE THE COURT.

The concept that the law of the forum with the most significant contacts governs capacity has recently been applied in the face of Rule 17b of

the Federal Rules of Civil Procedure. (See Power City Communications vs. Calaveras Telephone Company, 280 Fed. Supp. 808) The case involved a Washington corporation suing in California in the Federal Court for the Eastern District of California. In that case, the Eastern District Court applied the California State Rule of Law concerning capacity of corporations to sue rather than the Federal Rule 17b providing that capacity of corporations to sue or be sued be determined by the law under which the corporation was organized. The Court determined that the California Contractors Licensing statute affecting the plaintiff corporation's capacity to sue was more important to apply than Rule 17b which would have applied the law of the State of Washington.

> "Here we are dealing with Rule 17b which by referring to the laws of the State of organization of a corporation is inherently non-uniform in its application. The competing interests here are really not between California and the Federal Rules but between California and Washington with all significant parts of the transaction taking place in California."

The Court in this case made an interest analysis and applied the law of the local forum as against Rule 17b and Washington law which Rule 17b called for.

The following statement from 75 Yale Law Journal, page 132, supplied further authority for the proposition that the Federal Court when faced with a choice of law problem, should, even in the face of established rules, apply the law of the forum with the greatest interest in the litigation.

> "Modern conflicts theory makes it absurd to argue that forcing Federal Courts mindlessly to follow traditional choice of law rules which ignore the content of internal rules they choose best serves the purpose of effectuating local policies. The spectra of an independent federal judiciary frustrating local policy is no longer realistic. In fact, the federal judiciary in its unique posture of neutrality is better suited than

> state judges to be an arbiter between the interest of states deciding conflicts cases according to the principle of effectuating the policy goals expressed by internal laws . . . the prospects of a more equitable result in mere transfer cases and greater effectuation of local policy should make an interest-discriminative solution worth the try."

CONCLUSION

The progressive courts are providing the basis for the development of two concepts in determining choice of law problems; (1) that wherever possible the plaintiff's cause of action must be preserved in its fullest potential so that its merits may be decided after a full hearing in court, (Van Duson holding, see Transcript of Record, page 33 to 35, Memorandum in Support of Motion for Change of Venue, page 6 line 11 to page 8 line 5, and cases cited therein) and (2) that the local court in deciding what law to apply should apply the law of the forum which has the greatest interest in and contacts with the litigation before it. Both of these concepts applied to the situation presently before the Court require that the Nevada forum apply the laws of Nevada in all its particulars and reject the application of California law. This is not a matter of forum shopping. This is a matter concerned with applying the law of the forum with the most significant contacts with the litigation. Under this theory even if the action remained in California, the California Court would be required to apply laws of the State of Nevada to this controversy.

If the law of California is applied, through the use of Rule 17b, the plaintiff corporation will be precluded from pursuing a valid cause of action due to law resulting from the policy of a state having no substantial connection with the parties or the litigation. The defendant corporation, on the other hand, will escape the necessity of having to defend itself

in a court of law for having breached a contract resulting in the demise of plaintiff's business and will escape this obligation due to the application of a forum's law unrelated to the place where the business was carried on and unaffected by the economic repercussions to the community and parties of that business failure.

Respectfully submitted,

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Dated at Sacramento, California
this 13th day of June, 1968.